

Supreme Court, U.S.

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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1977

No. 77-1305

PARKLANE HOSIERY COMPANY, INC. and  
HERBERT N. SOMEKH,

*Petitioners,*  
*against*

LEO M. SHORE,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

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## REPLY BRIEF FOR PETITIONERS

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IRVING PARKER

*Counsel for Petitioners*

70 Pine Street

New York, New York 10005

Tel. No. (212) 344-1866

*Of Counsel:*

JOSEPH N. SALOMON

JACOBS PERSINGER & PARKER

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**REPLY BRIEF FOR PETITIONERS**

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Respondent, in an attempt to defeat certiorari, confirms that certiorari should be granted. Respondent's brief (pp. 11-14) not only concedes but emphasizes the conflict between the Fifth and Second Circuits on the important constitutional question whether, in the absence of mutuality, the right to trial by jury may be destroyed through collateral estoppel. On that question, Respondent argues that the Second Circuit, in its decision below, was clearly correct and that the Fifth Circuit, in *Rachal v. Hill*, 435 F.2d 59 (1970), *cert. denied*, 403 U.S. 904 (1971), was clearly wrong. It remains for this Court to decide the question and resolve the conflict.

**I**

Respondent's brief (pp. 9-11) mistakenly relies upon *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971) to contend that a post-1791 change in the common law doctrine of collateral estoppel has destroyed the constitutional jury trial right. In so doing, Respondent has ignored the fact that *Blonder-Tongue* did not even present a question of the loss of a jury trial right. Contrary to the inflexible rule which Respondent has attributed to *Blonder-Tongue*, this Court, in *Blonder-Tongue*, expressly stated that, in the absence of mutuality, collateral estoppel could not be applied pursuant to an "automatic formula". 402 U.S. at 334.

This same principle was stated and applied by the Fifth Circuit in *Rachal* which held that, in the absence of mutuality, collateral estoppel could not be applied to destroy a jury trial right. Petition, pp. 13-15. This Court has not held otherwise. *Blonder-Tongue*, contrary to Respondent's contention, did not "effectively" overrule *Rachal* in any respect. *Blonder-Tongue* did not even suggest that, in the absence of mutuality, collateral estoppel could destroy a constitutional jury trial right. There is thus no inconsistency between *Blonder-Tongue* and *Rachal*.

**II**

Respondent's brief (p. 9) rests upon the demonstrably incorrect premise that a determination of factual issues in one action automatically renders them undisputed in another action. It thereby begs the unresolved question presented here as to whether collateral estoppel is or is not applicable. Where collateral estoppel is not applicable, issues determined in an earlier action remain in dispute in a second action.

Respondent's brief (pp. 10-11) also employs its question-begging premise to avoid recognition of the undisputed constitutional principle enunciated in *Dimick v. Schiedt*, 293 U.S. 474 (1935). On the basis of its erroneous assumption, Respondent contends that *Dimick* and the instant case are distinguishable. As to *Dimick*, Respondent argues that there were issues for jury determination; as to the instant case, Respondent simply relies upon an assumption that there are no such issues. To the contrary, if the constitutional jury trial right here is upheld against a claim of collateral estoppel, then here, as in *Dimick*, there are issues for jury determination. Respondent's claimed distinction is no distinction at all.

*Dimick* was decided upon the constitutional principle, ignored by Respondent, that a post-1791 change in the common law cannot serve to destroy the jury trial right which the Seventh Amendment preserved as that right existed in 1791. That principle is equally applicable here to preserve Petitioners' jury trial right, notwithstanding the relaxation of the requirement of mutuality.

**III**

Respondent's brief (pp. 11-14) again underscores the conflict between the decisions of the Fifth and Second Circuits in contending that one, but not the other, correctly read and applied *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959). Though Respondent's brief claims that the Court below properly applied the reasoning of *Beacon Theatres* "and its progeny", that brief completely overlooks this Court's subsequent decision in *Meeker v. Ambassador Oil Corp.*, 375 U.S. 160 (1963), *rev'd mem.*, 308 F.2d 875 (10th Cir. 1962).

As has been seen (Petition, pp. 10-12), *Beacon Theatres* and *Meeker* teach (a) that as between the constitutional jury trial right and the common law principle of collateral estoppel, the jury trial right is supreme and, accordingly, (b) that the Fifth Circuit correctly upheld the jury trial right in *Rachal* after there had been a full and fair trial to the court alone in an earlier-tried action in which the jury trial right did not exist.

#### IV

Respondent now for the first time claims that Petitioners waived their jury trial right in this action by not requesting a jury or an advisory jury in the earlier-tried SEC action (Resp. br. pp. 14-15). Having made such a claim, that brief (pp. 8, 15) is patently inconsistent in asserting that the question whether there was such a waiver is not before this Court. In any event, the claimed waiver is devoid of merit.

In the circumstances here, the claimed waiver could not have occurred. The right to a jury trial did not exist in the SEC action; there was no jury trial right to request; the use of an advisory jury could not satisfy the Seventh Amendment jury trial right; and, accordingly, the absence of a request for a jury or an advisory jury in the SEC action could not constitute a waiver of the jury trial right in this action. Petition, pp. 25-27.

Respondent does not contend, as the Court below had suggested, that the jury trial right in this action was waived because this action was not expedited and tried prior to the trial of the SEC action. As has been seen, this action could not have been expedited and tried before the trial of the SEC action. Petition, pp. 22-23. However,

unlike the Court below, Respondent's brief (pp. 8, 15) contends, for the first time, that Petitioners waived their jury trial right in this action by not seeking a stay of the SEC action. This contention is also devoid of merit. Respondent's brief is completely silent as to the authorities which uniformly establish that such a stay of an SEC action is unavailable and that a request therefor would have been futile. Petition pp. 23-25.

Clearly, there was no waiver of Petitioners' jury trial right. The constitutional question arising from the conflict between the Fifth and Second Circuits is squarely presented. The question, its importance and the need for its resolution are clear.

Respectfully submitted,

IRVING PARKER  
Counsel for Petitioners  
70 Pine Street

New York, New York 10005  
Tel. No. (212) 344-1866

*Of Counsel:*  
JOSEPH N. SALOMON  
JACOBS PERSINGER & PARKER